

IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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CLARANCE A. REES and EVELYN E. REES, bankrupts,  
*Appellants,*

vs.

SOREN N. JENSEN and ANNA JENSEN, *Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

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BRIEF OF APPELLANTS

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COLVIN & WILLIAMS,  
*Attorneys for Appellants.*

DAVID J. WILLIAMS,  
MARY E. BURRUS,  
*of Counsel.*  
Central Building,  
Seattle 4, Washington.

FILED

APR 12 1948



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CLARANCE A. REES and EVELYN E. REES,  
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*Appellants,*

vs.

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*Appellees.*

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**No. 11830**

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

**BRIEF OF APPELLANTS**

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**JURISDICTION**

*Jurisdiction of the District Court* in this cause is based upon U.S.C. Title 28, Section 41-19, conferring upon Federal District Courts original jurisdiction in all matters and proceedings in Bankruptcy.

*Jurisdiction of the Circuit Court of Appeals* in this cause is based upon U.S.C. Title 28, Sec. 225, authorizing an appeal to a United States Circuit Court of Appeals from a final decision in a Federal District Court and U.S.C. Title 28, Sec. 230, requiring such an appeal to be taken within three months after entry of judgment. In this cause the judgment of the District Court was entered on October 13, 1947 (R. 22) and Notice of Appeal and Supersedeas Bond were duly filed on October 15, 1947 (R. 28) F.R.C.P. Rule 73.

## STATEMENT OF THE CASE

Because of the importance of the factual issues, the following extended statement of the case has been thought necessary to a full understanding.

\* \* \* \* \*

This cause arises out of litigation involving two parcels of land, forming one continuous tract, which lies in the vicinity of Lake Meridian near the point at which Jenkins Creek crosses the James B. Kinne Road, about four miles from the Town of Kent in the State of Washington. One of these parcels, often referred to in the record as "Tax lot 4" and hereafter for convenience so called, is described as follows:

"That portion of said Government Lot 2, lying southeasterly of the Northern Pacific Railroad Company right of way and Westerly of the James B. Kinne Road, Section 2, Township 21 North, Range 5 EWM, situated in King County, Washington, being known as Tax Lot 4." (R. 68).

The other parcel, hereafter referred to as the "Skirving property," is described as follows:

"That portion of the Southeast quarter of the Northwest quarter of Section 2, Township 21, North, Range 5 East WM, lying East of the Northern Pacific Railway Right of Way; and the West 990 feet of the Southwest Quarter of the Northeast Quarter of said Section, less the Northern Pacific Railway Right of Way; and less the South 660 feet of the East 660 feet; less portion of the North 660 feet lying Easterly of Jenkins Creek; and less portion of the South

330 feet of the West 330 feet lying Easterly of Jenkins Creek, together with a right of way for road over that portion of the North 25 feet of the Southwest Quarter of the Northeast Quarter lying between Jenkins Creek and Soos Creek-Berrydale Road; except roads, situated in King County, Washington." (R. 73).

Plats of the area here under discussion are included in the record in this case (R. 59, 60).

Tax lot 4 is a piece of vacant pasture of about 1.5 acres (R. 71) which adjoins along its south boundary the Skirving property and forms a continuation thereof (R. 73). The Skirving property comprises about 22 acres. Upon said tract of land are located certain structures, *viz.*, a house, sheds, barn, and refrigerator car (R. 74-75, 78), whose exact position upon said tract with reference to the boundaries of the Skirving property and Tax lot 4, as will hereafter appear, were determined in the course of and as incident to a proceeding in the Superior Court of the State of Washington for King County, hereafter called the Superior Court. It is these structures whose conversion by appellants gave rise to the judgment debt (R. 78) which, appellants contend, has been discharged.

Appellees owned Tax lot 4 from June, 1929, until April 21, 1932, when a tax deed covering said Tax lot 4 was issued to King County, Washington, as the result of a foreclosure of a certificate of delinquency for general taxes for the years 1924 to 1927 (R. 69-70).

The Skirving property was owned by Cora J. Skirving at the time that appellees acquired Tax lot 4 (R. 73). In 1932, one Doc Hamilton purchased said property from Cora J. Skirving on real estate contract, and in the same year erected thereon a house, sheds, barn and moved a refrigerator car thereon (R. 74). Thereafter certain labor liens were foreclosed thereon, and Cora J. Skirving was made a party defendant. In this foreclosure, Cora J. Skirving entered into a stipulation that the buildings be separated from the land and sold as personalty (R. 74). On or about May 9, 1938, appellees purchased said buildings at public auction held in accordance with said stipulation. Appellees thereafter moved the buildings from the place where they were standing onto the north 65 feet of the Skirving property under the mistaken belief that they owned the 65 feet as the south portion of Tax lot 4, a belief shared by Cora J. Skirving (R. 74-75). Neither appellees nor Cora J. Skirving knew where the true boundary line between the Skirving property and Tax lot 4 existed and appellees would neither have continued in possession and maintained the buildings on the north 65 feet of the Skirving property nor would Cora J. Skirving have permitted the appellees to remain in possession of the north 65 feet of the Skirving property if they had known where the true boundary line existed (R. 75).

On or about January 13, 1944, appellants entered into a real estate contract for the purchase of this property from Cora J. Skirving (R. 73-74), by which

Cora J. Skirving undertook to convey the property owned by her "with the appurtenances thereto belonging \* \*. \*" (R. 61), and by which appellants agreed to "keep all buildings thereon insured for a sum equal to the deferred payments above specified, in some insurance company satisfactory to said vendor \* \* \*" (R. 62). Appellants immediately took possession thereof, and during the pendency of the action in the Superior Court (hereafter referred to), received a warranty deed of said property from Cora J. Skirving (R. 74).

On or about March 20, 1944, appellants received a conveyance of Tax lot 4 from King County (R. 71), paying therefor to King County the sum of \$50.00 together with the cost thereof amounting to approximately \$9.00 (R. 72).

At the time of the issuance of the deed to Tax lot 4 to appellants, appellees had tenants upon said property (R. 72).

Appellants, by their then attorney, M. L. Longfellow, in a letter dated February 26, 1944, addressed to appellees and their tenants, demanded possession of said property (R. 64, 72), stating as their reason for such demand that:

"There is a dwelling house located in part, possibly, upon this property, but Mr. Rees has purchased other real estate joining this, and consequently is entitled to the dwelling house regardless of whether the same is located upon the real estate herein above described (Tax lot 4), or upon the other tract of real estate which

has been purchased by Mr. Rees (obviously referred to the Skirving property)."

Shortly thereafter, appellants took possession of the premises and retained them (R. 72).

Appellees, in the same year, began a suit in equity in the Superior Court whose purpose, according to the affidavit of appellees' attorney, was "to set aside a certain County Treasurer's Tax Deed issued to the defendants herein covering certain property allegedly belonging to the plaintiffs, and to forever quiet title to the property described in said tax deed in the plaintiffs" (R. 32). This complaint, which is reproduced almost verbatim as a first cause of action in appellees amended complaint (R. 36), was based upon facts allegedly showing that appellees had been frustrated by agents of the Treasurer of King County in their attempt to pay taxes on Tax lot 4, and were, therefore, entitled to relief predicated upon such facts. The structures in question on this appeal were mentioned only incidentally in the complaint as being located upon Tax lot 4, and no relief in any way connected with them was sought.

Appellants on August 31, 1944, gave notice of trial amendment to amend their answer to allege that Tax lot 4 was not improved by any dwelling house and had no improvements of value upon it (R. 30).

Thereupon on September 2, 1944, appellees entered a motion to amend their summons and complaint (R. 31) by adding a new party and new cause of action. In support thereof, appellees' counsel filed an affidavit (R. 32) in which it was deposed that "\* \* \* at the

*time suit was brought and the issues framed by the litigating parties, it was the belief of all said parties plaintiffs and defendants that certain improvements, consisting of a five-room house, outhouse, and sheds of the reasonable value of \$2,000.00 were located upon property described in the Tax Deed [Tax lot 4] \* \* \**” (R. 32). The remainder of the affidavit is concerned with a statement of matter later reproduced as the appellees’ second cause of action, discussed below.

Upon proper leave, an amended complaint was filed by appellees in the Superior Court on Sept. 6, 1944 (R. 36). The first cause of action alleged facts claimed to entitle appellees to a decree quieting title to Tax lot 4 for the reasons above stated. Appellees’ second cause of action (R. 43) alleges facts calculated to show adverse possession of the north 65 feet of the Skirving property for the prescriptive period by the appellees. In this cause of action, just as in their first cause of action, appellees mentioned the improvements upon the land only incidentally (R. 45, 46), nowhere setting out facts which amounted to an allegation of conversion of the structures even by inference.

After a full trial upon the merits (R. 65), findings of fact and conclusions of law were entered in the Superior Court action. The legal conclusions of the judge of the Superior Court were, first, that appellees had not by clear, cogent and convincing evidence established their right to have title to Tax lot 4 quieted in them (R. 77), and, second, that ap-

pellees' evidence did not establish that they were entitled to the north 65 feet of the Skirving property upon the ground of acquisition by adverse possession. Thereupon, the court noted that the action before it was equitable in nature and that the court had the right to do equity between the parties, having acquired jurisdiction of them and the cause of action (R. 77). Upon the strength of this pronouncement and certain findings of fact set out next below, the court then proceeded to enunciate the bare conclusion that appellants had converted the structures here in question (R. 78).

In support of its determined effort to achieve "equity" between the parties, the court found that the structures upon the north 65 feet of the Skirving property

"have been at all times considered as personalty by the plaintiffs and the defendant Skirving [N.B., not the appellants]; and that the time of her sale of said property to the defendants Clarence A. Rees and wife said structures were not included in the sale and no consideration was given for them or either of them. That the defendants Rees and wife never at any time believed they were purchasing said structures, or either of them, having been advised at the time of their purchase that the buildings were no part of the property purchased." (R. 75).

It is upon these narrow factual conclusions that appellees' case must rest.

The extremely restricted scope of these findings is shown by the refusal of the court to find anything

beyond their bare terms. Appellees included in their draft of the findings of fact presented to the court the following relatively innocuous factual conclusion:

“That at the time of the purchase of said property (Tax lot 4) the Defendant Rees and wife, knew the value of said property was greatly in excess of the amount paid, and also knew that plaintiffs were ignorant of the pending proceedings for the sale of said property by the County Treasurer.” (R. 72).

which the Superior Court judge struck and deleted (R. 72).

\* \* \* \* \*

After the rendition of the judgment of the Superior Court, appellants filed a voluntary petition in bankruptcy in the District Court of the United States for the Western District of Washington, Northern Division. In the course of such proceedings, appellees filed objections to the discharge of the bankrupts from the liability evidenced by the Superior Court judgment (R. 2, 3). Upon stipulation of the attorneys for all parties, made in open court on May 6, 1947, the matter was considered and decided upon certain documentary evidence, oral argument and briefs submitted in support of the several contentions of the parties (R. 3, 4). A decision by the referee on objections to release of appellants from the Superior Court judgment (R. 6) was rendered on May 15, 1947, denying release from the judgment to the appellants. Findings of fact and conclusions of law in accordance with referee's decision were entered on May 23, 1947 (R. 13).

Appellants appealed from the decision, findings of fact, and conclusions of law of the referee to the District Court and the court, per Black, J., rendered an oral decision on September 30, 1947 sustaining the referee. An order in accordance with this decision was entered by the court on October 13, 1947.

### SPECIFICATION OF ERRORS

1. The District Court erred in sustaining the Decision of the Referee in excepting from the benefit of the discharge, the judgment debt of Soren N. Jensen and Anna Jensen, both in law and in fact.

2. The District Court erred in failing to distinguish between the law here applicable and the law properly applicable only to those conversions arising out of aggravated circumstances.

3. The District Court erred in believing himself bound to uphold the Referee's Decision, when the decision was not supported by the record in the cause, to-wit:

a. Finding of Referee that:

“\* \* \* the buildings were considered and known to all the parties, including the bankrupts, to be the personal property of the judgment creditors \* \* \*.”  
(R. 15)

b. The statement of the Referee that:

the structures “were probably mistakenly placed on Tax Lot 4, which gave rise to this litigation.”  
(R. 8)

c. The inference that the Referee made that the value of Tax Lot 4 was greatly in excess of the amount paid therefor. (R. 8)

d. The statement of the Referee that:

“These circumstances and the fact that the bankrupts did not avail themselves of the privileges of taking the witness stand and explaining what motives they had or what possible justifications they could have in converting to their own uses the personal property of the judgment creditors, leaves the Findings of Fact and Conclusions of Law upon which the judgment is based unanswerable.” (R. 8)

4. The District Court erred in not giving the bankrupts the benefit of the presumptions existing in their favor, and placing upon them the burden of proving the debt not dischargeable (R. 27).

5. The District Court erred in giving greater weight to the Referee’s Decision than he was legally required to when the same record in its entirety was before him (R. 3, 27).

## STATEMENT OF POINTS

### I.

Appellees should have shown those aggravated features in appellants’ conduct which are a necessary constituent of a wilful and malicious injury to property in order to have estopped appellants from obtaining the benefit of their discharge in bankruptcy.

A. Not every conversion is a wilful and malicious injury to property within Section 17 (a) (2) of the Bankruptcy Act, 11 U.S.C. §35 (a) (2).

B. Wilfulness and malice are present only where there is a wanton disregard of the rights of others.

C. The burden of proof of wilfulness and malice was upon appellees.

## II.

Appellants did not act in wanton disregard of appellees' rights; therefore, appellants did not wilfully and maliciously injure appellees' property.

## III.

The decision of the Referee in Bankruptcy was based upon facts not of record.

- A. In the face of the express refusal of the Superior Court to so find, the Referee found that appellants knew that the value of Tax Lot 4 was greatly in excess of the amount paid therefor.
- B. The Referee's finding that the structures herein were known to appellants to be the personal property of appellees is without basis in the record.
- C. The Referee ignored the record as to the location upon the land of the structures converted by appellants.

## IV.

The Referee, by drawing an inference unfavorable to appellants from their failure to take the witness stand, erroneously shifted the burden of proof.

## V.

The district judge erred in sustaining the decision of the Referee.

- A. After indicating that he was unable to perceive any evidence of wanton misconduct by appellants, the district judge erroneously sustained the Referee's decision that appellants had acted wilfully and maliciously.
- B. The district judge accorded excessive weight to the Referee's findings of fact.

## ARGUMENT

Section 17 of the Bankruptcy Act, U.S.C. Title 11, Section 35, provides:

“Debts not affected by a discharge.

“(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any state, county, district, or municipality; (2) *are liabilities for obtaining money or property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation*; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; or (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; or (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of/a contract of employment.” (Italics ours)

## I.

Appellees should have shown those aggravated features in appellants' conduct which are a necessary constituent of a wilful and malicious injury to property in order to have estopped appellants from obtaining the benefit of their discharge in bankruptcy.

- A. Not every conversion is a wilful and malicious injury to property within Section 17 (a) (2) of the Bankruptcy Act (11 U.S.C.) §35(a)(2)).
- B. Wilfulness and malice are present only where there is a wanton disregard of the rights of others.
- C. The burden of proof of wilfulness and malice was upon appellees.

**I. Appellees should have shown those aggravated features in appellants' conduct which are a necessary constituent of a wilful and malicious injury to property in order to have estopped appellants from obtaining the benefit of their discharge in bankruptcy.**

This argument is intended to demonstrate that the conduct of appellants which underlies the finding of conversion by the Superior Court is not of that aggravated character essential to a finding of wilfulness and malice within the intendment of Section 17 of the Bankruptcy Act. To achieve this end it is necessary that the applicable law be discussed in some detail.

**A. Not every conversion is a wilful and malicious injury to property within Section 17(a)(2) of the Bankruptcy Act (11 U.S.C. §35(a)(2)).**

Although the main distinctions made by the courts which have considered these questions are of some nicety, it is abundantly clear that all have agreed that not every conversion is a wilful and malicious injury to property. In the leading case of *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 332, 55 Sup. Ct. 151 (1934), a case of conversion under the provision of the Bankruptcy Act here in point, more fully discussed below, Mr. Justice Cardozo stated:

“There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without wilfulness or malice.”

Likewise, in *In re Levitan* (D.C. N.J. 1915) 224 Fed. 241, 243, 244, the court said:

“In the present case the judicial determination that the defendant was guilty of conversion did not establish that he acted maliciously, for the reason that malice or bad faith is not a necessary element of conversion. If he acted in good faith, the act, though intentional amounting to conversion would not have been malicious, even though it should be ultimately determined to have been legally indefensible. To hold otherwise would be to make all intentional acts falling under the head of torts, resulting in injury to person or property, malicious and nondischargeable in bankruptcy, regardless of the motives which animated them.”

To the same effect are *Brown v. Garey*, 267 N.Y. 167, 196 N.E. 12 (1935); *Ulnner v. Doran*, 167 App. Div. 259, 152 N.Y. Supp. 655 (1915).

***B. Wilfulness and malice are present only where there is a wanton disregard of the rights of others.***

Since all conversions are not from their very nature wilful and malicious, the distinction between those which have such a character and those which do not must be next discussed.

This distinction, which had occasioned some courts no little difficulty until the decision of *Davis v. Aetna Acceptance Co.*, *supra*, was by that decision, it is submitted, firmly grounded upon the difference between acts of conversion indicating a wanton, unconscionable intention in the convertor and acts of conversion which failed to clearly evidence such motivation.

In the *Davis* case, *supra*, the bankrupt, an automobile dealer, borrowed more than one thousand dollars from the judgment creditor to finance the purchase of an automobile. Upon delivery of the automobile to the bankrupt, he gave to the judgment creditor a security title to the automobile by means of a chattel mortgage, a trust receipt, and a bill of sale absolute in form. Shortly thereafter, the bankrupt sold the automobile in the ordinary course of his business and without the consent of the judgment creditor. The creditor obtained a judgment against the bankrupt in an action prosecuted in the courts of the State of Illinois in which the trial court found the bankrupt was "guilty of legal conversion of the property, as described in the count of trover." During the pendency of the action for conversion in the trial court, the bankrupt had filed a petition in bankruptcy and received his discharge. The bankrupt's plea of a dis-

charge in bankruptcy was overruled by the trial court in the action for conversion and judgment was rendered for the creditor. The case was taken from the courts of Illinois to the Supreme Court of the United States, on certiorari, where the judgment was reversed. There, Mr. Justice Cardozo, speaking for the court, on pages 331, 332 and 333, said:

“The respondent contends that the petitioner was liable for a wilful and malicious injury to the property of another as the result of the sale and conversion of the car in his possession. There is no doubt that an act of conversion, if wilful and malicious, is an injury to property within the scope of this exception. Such a case was *McIntyre v. Kavanaugh*, 242 U.S. 138, where the wrong was unexcused and wanton. But a wilful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. \* \* \* The discharge will prevail as against a showing of conversion without aggravated features.”

The case of *McIntyre v. Kavanaugh*, 242 U.S. 138, 37 Sup. Ct. 38 (1916), cited with approval in the portion of the *Davis* case above quoted, illustrates the kind of conduct which may prevent the release of a bankrupt. It arose out of an action for conversion of certain stock certificates deposited by the creditor with a firm of brokers as security for the creditor's indebtedness. Within a few weeks after the deposit of the certificates the brokers without authority and without the creditor's knowledge sold the stocks and appropriated the avails to their own use. Shortly thereafter both the firm and its members were ad-

judged bankrupt and plead their discharge in the action for conversion. The trial court expressly found that the conversion was a wilful and malicious injury to the property of the creditor, a fact in itself sufficient to distinguish that case from the instant matter. Moreover, the deliberate and wilful character of the bankrupts' acts in the *McIntyre* case, more consonant with an intentional and knowing disregard of the creditors' rights than with the innocent misadventure of the bankrupts in the instant situation, serves to distinguish the *McIntyre* case. The appropriation of property left with a broker as security, no error or misunderstanding on the broker's part being shown in extenuation, is a very different thing from the error committed by the bankrupt herein acting under the honest belief that he was asserting dominion over his own property.

That the case of *McIntyre v. Kavanaugh*, *supra*, has been understood as being severely limited in its application since the decision in the *Davis* case, *supra*, is shown by a recent decision of the New York Court of Appeals (the very court whose decision in the *McIntyre* case was affirmed by the United States Supreme Court in the opinion discussed above) in its recent decision in *Brown v. Garey*, 267 N.Y. 167, 196 N.E. 12, 13 (1935). The *Brown* case is important not only for its treatment of the *McIntyre* case, but for the further light that it throws on the distinction between judgments for conversion which may be discharged in bankruptcy and those which may not. The bankrupts, in the *Brown* case, were stockbrokers who received a certificate of stock from the plaintiff for

the sole purpose of having it sold on the New York Stock Exchange. A few weeks later, the bankrupts, without the knowledge, consent or authority of the plaintiffs, pledged the certificates to secure a loan. A few days later, a petition in bankruptcy was filed against the bankrupts. The certificate in question was sold by the pledgee. Upon these facts, whose similarity to those of the *McIntyre* case is apparent, the New York court was called upon to determine whether or not the bankrupts could successfully plead their discharge as a defense in the suit for conversion of the stock certificates. Judgment was given for the bankrupt. The court, after quoting substantially that material from the *Davis* case set forth above, stated on page 13:

“The court must examine the circumstances of each particular case and say whether it finds among them the elements which the law has come to accept as badges of wilfulness and legal malice.

\* \* \* A wrongful act done intentionally which necessarily causes harm and is without just cause or excuse constitutes a wilful and malicious injury. *Kavanaugh v. McIntyre*, 210 N.Y. 175, 182, 104 N.E. 135, affirmed, 242 U.S. 138, 37 S. Ct. 38, 61 L. ed. 205; and cf. *In re Levitan* (D.C.) 224 Fed. 241, 243. \* \* \* Since a wrongful intent is not an essential element of conversion \* \* \*, an act of dominion done under mistake or misapprehension, and without conscious intent to violate right or authority, may yet be a conversion; but it is not a wilful and malicious conversion even though the mistake or misapprehension is due to negligence, the rule can be no different.”

At another point in its opinion, on page 13, the court in discussing the *McIntyre* case said:

“The conversion was larcenous in its nature and the injury was held to be wilful and malicious.”

To the same effect are the cases of *Massachusetts Bonding Co. v. Lineberry*, 320 Mass. 410, 70 N.E. (2d) 308 (1946); *Emigh v. Lohnes*, 21 Wn. (2d) 913, 153 P. (2d) 869 (1944); *In re La Porte* (D.C. W.D.N.Y.) 54 F. Supp. 911 (1943); *In re Levitan* (D.C. N.J.) 224 Fed. 241 (1915); *Ulner v. Doran*, 167 App. Div. 259, 152 N.Y. Supp. 655 (1915).

To be sharply distinguished from the line of authority properly applicable here are such cases as *Tinker v. Colwell*, 193 U.S. 473, 24 Sup. Ct. 505 (1904); *In re Freche* (D.C. N.J.) 109 Fed. 620 (1901) involving such quasi-criminal acts of bankrupts as criminal conversation and seduction which import a wanton disregard for the rights of others in their very nature. To liken such acts to the unintentional appropriation of structures, normally regarded as appurtenant to the land, ambiguously located upon property clearly owned by a bankrupt would be highly inexact.

Also to be distinguished are such cases as

*McIntyre v. Kavanaugh*, 242 U.S. 138, 37 Sup. Ct. 38 (1916);

*In re Minsky* (D.C. N.Y.) 46 F. Supp. 104 (1942);

*In re Green* (C.C.A. 7) 87 F. (2d) 951 (1937);

*Matter of Goldstein* (D.C. S.D.N.Y.) 30 F. Supp. 443 (1939);

*Weeks v. Streicher* (Ct. of App. Lucas County) 74 Ohio App. 253, 58 N.E.(2d) 415 (1943);

*Matter of Buzas* (D.C. N.D.Cal.) 58 F. Supp. 717 (1944);

*Probst v. Jones*, 262 Mich. 678, 247 N.W. 779 (1933);

*In re Blauweiss* (City Ct. of N.Y. Queens County) 23 N.Y. Supp. (2d) 907 (1940);

*In re Gumbinsky* (D.C. W.D.N.Y.) 8 F. Supp. 601 (1934);

*Van Epps v. Aufdemkamp* (Cal. Dist. Ct. of App. 2d Dist. Div. 1) 138 Cal. App. 622, 32 P.(2d) 1116 (1934);

*Smith v. Ladrie*, 98 Vt. 429, 129 Atl. 302 (1925);

*Frangos v. Frangos* (Superior Ct. Pa.) 157 Pa. Super 87, 31 A.(2d) 416 (1945).

In these cases, either upon the strength of an express finding of wilfulness and malice by the trial court, or after recognizing that there must be a wanton disregard of other's rights upon evidence of such disregard as is satisfactory to them, reviewing courts have refused to recognize discharges of bankrupts from judgments based upon conversion.

To sum up, appellants contend that the law properly applicable to the facts of this case should result in their discharge from a judgment arising out of conversion unless it clearly appears that they have engaged in conduct so shocking to the conscience of the

court and the community that they are not worthy of freedom from the burden of such a liability. The "aggravated circumstances" referred to in the opinion of Mr. Justice Cardozo in the *Davis* case, *supra*, mark the line between conduct which would preclude them from obtaining the benefit of a discharge in bankruptcy, and conduct which is wrongful but will not have this result.

**C. *The burden of proof of wilfulness and malice was upon appellees.***

The burden of proving the existence of unconscionable conduct by appellants was upon the appellees.

As was said in *Kreitlein v. Ferger*, 238 U.S. 21, 26, 35 Sup. Ct. 685 (1915):

"There are only a few cases dealing with the subject, but they almost uniformly hold that where the bankrupt is sued on a debt existing at the time of filing the petition, the introduction of the order makes out a *prima facie* defense, the burden being then cast upon the plaintiff [here appellees] to show that, because of the nature of the claim \* \* \* or other statutory reasons, the debt sued on was by law excepted from the operation of the discharge."

*Kreitlein v. Ferger* was followed in *Brown v. Garey*, *supra*, where, on page 13, the court rested its conclusions upon the premise that the burden was upon the plaintiff to show that the bankrupts "without just cause or excuse and knowing that it would necessarily cause him harm" have engaged in an allegedly wilful and malicious injury to property.

In *In re Levitan, supra*, at page 243, a case similar in its facts to the instant case, the court said:

“It being a provable debt in bankruptcy, the burden of proof is upon the judgment creditor to show that such liability is within the exception of Section 17 (a) (2).”

For the reasons which appear below, appellees have failed to sustain the burden incumbent upon them.

**II. Appellants did not act in wanton disregard of appellees' rights; therefore, appellants did not wilfully and maliciously injure appellees' property.**

During the entire course of their dealings with the land and structures involved in this case, appellants acted in a manner completely at variance with the criteria of wilfulness and malice laid down in the *Davis* and allied cases. Appellants' conduct was much more consistent with an honest belief in the validity of their claim to the structures converted by them, or, at least with a state of innocent confusion about the merit of such claim than with a wanton disregard of appellees' rights in these structures.

It is established beyond any doubt that the structures converted were, at all times during the pendency of this controversy, and for long prior thereto located upon the Skirving property (R. 74-75, 78). It is also apparent from the sworn admission of appellees' attorney (R. 32) and the appellants' notice of trial amendment (R. 30) that until the Superior Court proceeding was well advanced all parties believed that these structures were located upon Tax Lot 4.

Wholly consistent with this belief of appellants is the letter of appellants' attorney, dated February 26, 1944, sent to appellees and their tenants before the commencement of the Superior Court proceedings, in which letter appellants' attorney stated that one of the structures in question was located

“in part possibly upon this property” [Tax Lot 4] and went on to relate that ‘Mr. Rees has purchased other real estate adjoining this, and consequently is entitled to the dwelling house regardless of whether the same is located upon the real estate herein above described [Tax Lot 4] or upon the other tract of real estate which has been purchased by Mr. Rees’.”

[Skirving property] (R. 64-65). This letter clearly shows that appellants regarded the structures as belonging to them by virtue of their ownership of Tax Lot 4, that they at least conceived the possibility that there might be some doubt about the location of the structures with relation to the two parcels and that despite such doubt, they claimed the structures as appurtenant either to Tax Lot 4 or the Skirving property.

Appellants' belief that the structures were appurtenant to one or the other, or both, of the parcels owned by them was logically grounded in the real estate contract for the purchase of the Skirving property in which their grantor undertook to convey the land owned by her “with the appurtenances thereto belonging” (R. 61).

The very course of the proceedings in the Superior Court strengthens the inescapable impression that, far

from acting in unconscionable disregard of appellees' rights, appellants were asserting a well-founded claim to the structures. Appellees' complaint, reproduced in substance as the first cause of action in appellees' amended complaint (R. 36) requested no relief in any way connected with the structures upon the land. The only purpose of the complaint was "to set aside a certain County Treasurer's Tax Deed issued to the defendants herein \* \* \*, and to forever quiet title to the property described in the said tax deed in the plaintiffs" (R. 32).

Appellees' amended complaint (R. 36) filed after the exact location of the structures had been determined, still made no effort to bring into the controversy the structures upon the Skirving property. The first cause of action in the amended complaint repeated the essential allegations of the complaint and requested the relief therein sought (R. 36). The second cause of action in the amended complaint (R. 43) made no more of the facts surrounding the conversion of the structures, but confined itself to setting up facts which alleged ownership of the north 65 feet of the Skirving property by virtue of adverse possession by appellees. Appellees, at least until the trial stage of the Superior Court proceedings, apparently had not seen the structures as other than a part of the land upon which they were located. If they had, it is only logical to expect that they would have made more than a passing reference to the structures in all of their pleadings and would have sought some relief with regard to the structures considered as separate from the land.

Where appellees, who had participated in all of the transactions leading up to the separation of the structures from the land, did not, until the pleading stage of the Superior Court proceedings had been passed, realize that their rights in such structures had been violated, it is hard to conceive how appellants, acting prior to the institution of the Superior Court proceedings and without the advantage of full acquaintance with all of the transactions leading up to the separation of structures and land possessed by appellees, could have converted such structures in such utter disregard of appellees' rights as would constitute a wilful and malicious injury to property.

The fact that the trial judge in the Superior Court, in order to support his effort to achieve "equity" between the parties, found it necessary to rest his conclusion that a conversion had occurred upon a finding that, at the time of the sale of the Skirving property to appellants by appellants' grantor, the "structures were not included in the sale and no consideration was given for them or either of them," and upon the further finding that appellants "never at any time believed they were purchasing said structures, or either of them, having been advised at the time of their purchase that the buildings were no part of the property purchased" [Skirving property] (R. 75) should not conceal the fact that these findings are only the formal requisites of any judgment for conversion and do not demonstrate, in themselves, any malicious or wilful conduct of appellants.

The restricted availability of these findings as a

foundation upon which to rest the conclusion that appellants were wilful or malicious may be appreciated in the light thrown upon them by the refusal of the Superior Court judge to find any facts which would tend to show any malice or wilfulness in the appellants. In fact from the findings of fact presented by appellees' attorney, the Superior Court judge even struck the following:

"That at the time of the purchase of said property the defendants Rees and wife knew the value of said property was greatly in excess of the amount paid, and also knew that plaintiffs were ignorant of the pending proceedings for the sale of said property by the treasurer to them."  
(R. 72)

That appellees' case, when rested only upon those findings made by the Superior Court, lacked sufficient evidence of wilfulness and malice, was apparently recognized by the Referee in Bankruptcy in the proceedings with regard to appellees' objections. The Referee found, as an ultimate fact, that:

"It is more logical to believe that when Clarence A. Rees filed his application to purchase Tax Lot 4 \* \* \*, and made his bid therefore, the sum of \$50.00, that he was bidding for the land and not for the buildings, which of themselves were worth \$1,000.00 or more." (R. 8)

This factual conclusion by the Referee, upon which he directly rests his decision to sustain appellees' objections (R. 8), is the merest restatement of the proposed finding of fact to the effect that

"at the time of the purchase of said property the defendants Rees and wife knew the value of said

property was greatly in excess of the amount paid, \* \* \*." (R. 72)

which finding was expressly refused by the Superior Court. Yet without this finding the Referee apparently felt unable to conclude that there was wilful and malicious conduct by appellees.

In view of all of the foregoing facts, appellants urge that they committed no wilful or malicious injury to appellees' property.

**III. The decision of the Referee in Bankruptcy was based upon facts not of record.**

- A. In the face of the express refusal of the Superior Court to so find, the Referee found that the appellants knew that the value of Tax Lot 4 was greatly in excess of the amount paid therefor.
- B. The Referee's finding that the structures herein were known to appellants to be the personal property of appellees is without basis in the record.
- C. The Referee ignored the record as to the location upon the land of the structures converted by appellants.

The decision of the Referee in Bankruptcy on objections to the bankrupts' release from the judgment for conversion (R. 6) is based upon certain factual inferences without support in the record, and a finding of fact which shows a patent failure to comprehend even the most obvious circumstances of this proceeding.

**A. *In the face of the express refusal of the Superior Court to so find, the Referee found that appellants knew that the value of Tax Lot was greatly in excess of the amount paid therefor.***

As shown above at page 27 of this brief, the Referee in Bankruptcy found, in substance, that appellants knew at the time of the purchase of Tax Lot 4 that the value of said property was greatly in excess of the amount paid. As was previously shown, this finding was made in the very teeth of an express refusal by the Superior Court judge, who had heard all of the evidence, to make the same finding.

**B. *The Referee's finding that the structures herein were known to appellants to be the personal property of appellees is without basis in the record.***

The Referee's arbitrary action in this respect is important, not only because it clearly demonstrates his failure to grasp the limited scope of the judgment for conversion, but also because it is one of the main supports for his conclusion that appellants acted maliciously and wilfully.

The Referee's failure to grasp the essential facts of his controversy is further demonstrated by his finding that the structures:

“\* \* \* were considered and known to all the parties, including the bankrupts, to be the personal property of the judgment creditors \* \* \*.”  
(R. 15).

The Superior Court record may be searched in vain for a substantially similar finding by that court. The find-

ing of the Superior Court closest in its language to that of the referee is the following:

“That the houses, sheds, barns and each structure now upon said North 65 feet have been at all times considered as personalty by the Plaintiffs and the Defendant *Skirving* (Italics ours); \* \* \*.” (R. 75)

The difference between a finding that appellants' grantor had certain knowledge and a finding that appellants had the same knowledge is too obvious to be labored.

Findings as detrimental to the appellants as this should not have been made by one as far removed from the facts of the case as the Referee herein without substantial support for such findings in the record. The Referee appears to have been excessively prone to draw inferences unfavorable to appellants.

***C. The Referee ignored the record as to the location upon the land of the structures converted by appellants.***

In the Referee's decision on objections to release from judgment (R. 6) the following statement appears:

“Of great and controlling importance in this case are the facts that the buildings belonging to the Jensens and converted by the Rees' were personal property, had been severed from the realty in a lien foreclosure against “Doc” Hamilton, and had been physically removed from the place they were originally constructed and *probably mistakenly placed upon Tax Lot 4*, which gave rise to this litigation.” (Italics ours) (R. 7-8).

It is inconceivable that anyone with even a minimal grasp of the facts in the Superior Court record could, in view of the large role assumed in that proceeding by the determination of the exact location of the structures, have stated that such structures were "probably mistakenly placed upon Tax Lot 4." The fact that such structures were *not* upon Tax Lot 4 caused appellants to serve a notice of trial amendment (R. 30), appellees to enter a motion and affidavit to amend their summons and complaint in which the correct facts with respect to the position of the structures are clearly set forth (R. 31) and to add an entire, new cause of action in their amended complaint (R. 36), and caused the Superior Court to enter detailed findings about the exact location of the property (R. 74-75).

From a statement of the facts with regard to the structures which included the wholly erroneous statement that they were placed upon Tax Lot 4, an inference that the appellants' bid of \$50.00 was made for the land and not the structures thought to be upon it, which the Superior Court had expressly refused to draw, and a further highly doubtful inference, to be discussed below, the Referee concludes that the findings of fact and conclusions of law upon which the Superior Court's judgment was based were "unanswerable," and that appellants, consequently, had wilfully and maliciously injured appellees' property.

**IV. The Referee, by drawing an inference unfavorable to appellants from their failure to take the witness stand, erroneously shifted the burden of proof.**

The Referee heavily rested his conclusion that appellants had committed a wilful and malicious injury to appellees' property upon a factual inference expressed in the following terms:

"These circumstances and *the fact that the bankrupts did not avail themselves of the privilege of taking the witness stand and explaining what motives they had or what possible justifications they could have in converting to their own use the personal property of the judgment creditors*, leaves the Findings of Fact and Conclusions of Law upon which the judgment is based unanswerable." (italics ours) (R. 8).

The effect of this finding was to shift the burden of justifying the conversion to appellants. As shown above, the burden of proving that appellees' judgment debt was excepted from the effect of the discharge in bankruptcy was, and remained upon, the appellees throughout the course of the proceedings before the Referee.

Furthermore *appellees* "did not avail themselves of the privilege of taking the witness stand" to sustain *their* burden of proving appellants' alleged wilfulness and malice.

Where the burden of proof was upon appellees, and proffered no testimony to support their burden, the Referee should not have drawn a more unfavorable inference from appellants' failure to do the very thing that appellees, who had the greater burden, did not themselves do.

The case of *United States v. Mammoth Oil Co.* (C.C.A. 8) 14 F.(2d) 705 (1926) reversing 5 F.(2d) 330, certiorari granted 47 Sup. Ct. 332, 273 U.S. 686, 71 L.ed. 840 affirmed 48 Sup.Ct. 1, 275 U.S. 13, 72 L.ed. 138, involved an issue upon which it was necessary for the plaintiff to show the circumstances of the transfer of certain bonds from one of the defendants to another party. The court held that the plaintiff must produce affirmative proof of facts *prima facie* sufficient to sustain his contentions before inferences could be drawn from the silence of the defendant. The court stated on page 730:

“The silence of one who should speak may well create an inference adverse to him . . .

“Of course, a plaintiff in a case cannot insist that defendant must furnish evidence he may have or permit plaintiff to succeed, and there must be affirmative proof of facts *prima facie* at least to sustain plaintiff’s contentions before inferences [from defendant’s silence] can be properly drawn.”

*W. F. Corvin & Co. v. United States* (C.C.A. 6) 181 Fed. 296, 104 C.C.A. 270 (1910) was a case involving an action to confiscate whisky for substitution of the contents of the barrels in question after leaving the bonding house. The case turned on the issue of the *intent* to defraud. When the plaintiff attempted to show intent by the silence of the defendant on that issue, the court at page 304 stated:

“\* \* \* but they do not go to the extent of holding that where there is a total lack of evidence tending to show guilt, mere silence of the party pro-

ceeded against may be the basis of a presumption of his guilt.”

To the same effect see *McFarland v. Commercial Boiler Works*, 10 Wn.(2d) 81, 116 P.(2d) 228 (1941).

This inference, together with the equally erroneous inference to the effect that appellants knew that the value of Tax Lot 4 was greatly in excess of the amount that they had paid therefor (R. 8) (the latter inference having been discussed in the preceeding section of this argument), are the main supports of the Referee’s conclusions adverse to appellants. Without these supports the Referee’s conclusions must fall of their own weight.

## V.

The District Court erred in sustaining the decision of the Referee.

- A. After indicating that he was unable to perceive any evidence of wanton misconduct by appellants, the District Court erroneously sustained the Referee’s decision that appellants had acted wilfully and maliciously.
- B. The District Court accorded excessive weight to the Referee’s findings of fact.

As has been already shown, the Referee’s decision was without a basis in fact and law. The decision of the District Court sustaining the Referee’s decision must fall with the collapse of the latter.

*A. After indicating that he was unable to perceive any evidence of wanton misconduct by appellants, the District Court erroneously sustained the Referee's decision that appellants had acted wilfully and maliciously.*

In the course of the oral decision of the District Court (R. 23), there appear the following statements:

"If the matter were before me as a matter of first impression and without restriction by judicial decisions of courts which bind me, I would have no great difficulty. \* \* \*

"With no decisions to guide my course, I am inclined to believe that I would consider that language as not protecting the judgment of Mr. and Mrs. Jensen. But I am bound and controlled by a forest of authority. The weight of authority is to the effect that those simple words (referring to Section 17 (a) (2) of the Bankruptcy Act) include intentional conversion of the kind which Judge Ronald in his findings determined occurred on the part of the bankrupts as against the property of Mr. and Mrs. Jensen. As a result, I feel that in the light of the authorities which control me I must sustain, and therefore I do sustain the decision of the Referee." (R. 24,25).

The court, further, said:

"I feel I have no right to go further. I would not be justified in overruling the Referee by virtue of the feeling that I have that were there no decisions controlling me, that my opinion might be different. I can and will say that I am not absolutely certain that the Referee was correct. However, the records here, the arguments and the authorities sufficiently indicate that he is correct that I would have no right to reverse

his conclusion. I am not indicating that my mind is evenly balanced as to whether or not the Referee is correct. Even in that event I take it that I should allow his ruling to stand. \* \* \*"  
(R. 27).

The attitude of reluctant acquiescence in the decision of the Referee, expressed in the foregoing excerpts from the decision of the District Court, ill accords with the conclusion that acts of appellants were wanton and disregardful of the rights of others. The District Court's expressed feeling that his opinion might be different if there were no decisions controlling him (R. 27), his statement that with no decisions to guide his course he would not consider the language of the Bankruptcy Act as protecting the judgment of the appellees (R. 25) do not show that degree of indignation which would naturally be forthcoming from one who clearly perceived the presence of acts done in unconscionable disregard of the rights of innocent persons.

The forest of authority that the District Court felt controlled and bound him, no doubt refers to those cases cited by the Referee in his decision on objections to appellants' release from appellees' judgment (R. 10) which have been distinguished hereinabove.

***B. The District Court accorded excessive weight to the Referee's findings of fact.***

By such statements in his decision as: "I am not indicating that my mind is evenly balanced as to whether or not the Referee is correct. Even in that event I take it that I should allow his ruling to stand"

(R. 27) and "As a result, I feel that in the light of authorities which control me I must sustain, and therefore I do sustain the decision of the Referee" (R. 25), the District Court indicated that he felt that he labored under a greater duty to respect the findings of the Referee than was legally required in the circumstances. This was not a matter in which the Referee's findings were based upon opportunities to hear testimony and observe the demeanor of witnesses. The Referee's findings were based upon written evidence as available to the District Judge as to the referee.

In *In re Bowen* (D.C. E.D. Pa.) 58 F. Supp. 286, 294 (1944) affirmed (C.C.A. 3) 151 F.(2d) 690 (1945) the court said:

"Where the findings of referee represent deductions from established facts, they are entitled to little weight on certificate for review because the judge, from the same facts, could as well draw inferences or deduce conclusions as the referee."

In a leading case on this point, *Ohio Valley Co. v. Mack* (C.C.A. 6) 163 Fed. 155, 158 (1906), there appears the following statement:

"No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. \* \* \* Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee."

To the same effect is *In re Hercules Gasoline Co.* (C.C.A. 9) 76 F.(2d) 677 (1935).

### CONCLUSION

In conclusion, appellants respectfully submit that appellees have not sustained their burden of proving a wilful and malicious injury to their property by appellants so as to except their judgment from the discharge in bankruptcy. The Referee's decision to the contrary is supported by an erroneous view of both the applicable law and the facts. The decision of the District Court, sustaining the decision of the Referee, cannot stand alone, but must fall with the Referee's decision. In addition, the decision of the District Court is based upon a misconception of the applicable law, and an erroneous view of the weight to be accorded the Referee's finding.

Appellants respectfully submit that the judgment insofar as it excepts the judgment debt of the Jensens from the discharge in bankruptcy should be reversed.

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